Office - Supreme Court, U.S.
FILED
SEP 24 1981
ALEXANDER L. STEVAS
CLERK

No. 80-327

In the Supreme Court of the United States

OCTOBER TERM, 1980

VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

REX E. LEE
Solicitor General
STEPHEN M. SHAPIRO
Deputy Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

Abington School District v. *Schempp*, 374 U.S. 203 ..... 7, 14
Adickes v. *Kress & Co.*, 398 U.S. 144 17
American Civil Liberties Union of Georgia v. *Rabun County Chamber of Commerce*, 510 F. Supp. 886 9
Anderson v. *Salt Lake City Corp.*, 475 F.2d 29..... 9
Aronow v. *United States*, 432 F.2d 242 8
Ashcroft v. *Mattis*, 431 U.S. 171 16
Board of Education v. *Allen*, 392 U.S. 236 14
Bradfield v. *Roberts*, 175 U.S. 291 4
Califano v. *Sanders*, 430 U.S. 99 17
Control Data Corp. v. *Baldrige*, Nos. 80-1143, *et al.* (D.C. Cir. Mar. 25, 1981), petition for cert. pending, No. 80-2175 (filed June 23, 1981)..... 17
Doremus v. *Board of Education*, 342 U.S. 429.....6, 9, 12, 15, 17
Flast v. *Cohen*, 392 U.S. 83 .....2, 5, 6, 7, 12, 14
McGowan v. *Maryland*, 366 U.S. 420 14
O'Hair v. *Blumenthal*, 462 F. Supp. 19 8
Perkins v. *Lukens Steel Co.*, 310 U.S. 113 18
Public Citizen, Inc. v. *Simon*, 539 F.2d 211 13
Roemer v. *Maryland Public Works Board*, 426 U.S. 736 4
Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 .....*passim*
Sierra Club v. *Morton*, 405 U.S. 727 .....11, 16, 17
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 2
Stone v. *Graham*, 599 S.W.2d 157, judgment reversed, 449 U.S. 39 14
Two Guys from Harrison-Allentown v. *McGinley*, 366 U.S. 582 14
United States v. *Richardson*, 418 U.S. 166 .....2, 5, 6, 9, 12, 13, 15
United States v. *Santana*, 427 U.S. 38 17
United States v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669..9-10, 17-18

Cases—Continued Page

United States Parole Commission v. *Geraghty*, 445 U.S. 388 11
Walz v. *Tax Commission of New York*, 397 U.S. 664 4
Warth v. *Seldin*, 422 U.S. 490 ..... 2, 8

Constitution, statutes and rules:

United States Constitution:

Article I, Section 8, Clause 1 (Taxing and Spending Clause) 12, 14
Article III 6, 9, 13, 14, 16, 17
Article IV, Section 3 12
First Amendment (Establishment Clause) ..... *passim*

Administrative Procedure Act, 5 U.S.C. 702 ..... 17, 18
Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.* 18
Sup. Ct. R.:
Rule 19.6 1
Rule 35.3 1

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-327

VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS *

1. Americans United devotes the first 19 pages of its brief to the question whether the sale of property involved in this case "is forbidden by the Establishment Clause of the First Amendment" (Br. 11). That, however, is not the issue before the Court. The issue is whether Americans United has standing to challenge a sale of property in which it has no inter-

* Although the United States and the Department of Education are respondents in this Court, they support the position of petitioner and accordingly file the instant reply brief in response to the contentions raised in the briefs filed by respondents Americans United for Separation of Church and State, *et al.* ("Americans United") and supporting amici. See Rules 19.6 and 35.3 of the Rules of this Court.

est and from which it has suffered no adverse effect. Whether, in the abstract, a constitutional argument can be formulated to challenge the sale has no bearing on Americans United's standing to sue. The decisions of this Court clearly reject the notion that the issue of standing to sue can be relegated to the position of a mere technicality simply because the complaining party believes that its cause of action is meritorious. See *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) ("standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated'" (quoting *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968)); *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 225 n.15 (1974) ("there was no occasion for the district court or the court of appeals to reach or evaluate what it saw as the merits of respondents' complaint"); *United States* v. *Richardson*, 418 U.S. 166, 174 (1974) ("[w]e need not and do not reach the merits of the constitutional attack").[1]

---

[1] *Flast* v. *Cohen*, *supra*, 392 U.S. at 99, also recognizes that the threshold examination of standing to sue focuses on the party seeking to invoke the judicial process "and not on the issues he wishes to have adjudicated." The plaintiff's substantive claim is relevant in taxpayer actions only to determine whether there is a "logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. See also *United States* v. *Richardson*, *supra*, 418 U.S. at 174. As explained in our opening brief, there is no logical nexus between Americans United's status and its substantive claim that would permit it to invoke the jurisdiction of a federal court. See Br. 28-30.

Moreover, the attempt of Americans United to bootstrap its way into federal court through repeated assertions about the merits of its case is unavailing because those assertions rest on a serious mischaracterization of the facts. Americans United nowhere offers record support for its contention (Br. 13, 16) that the federal government made a "gift" or "donation" to the college or has received inadequate "consideration" for the property it sold. Nor could it make such a demonstration. The record shows that Valley Forge Christian College agreed to extend significant secular benefits to the community in exchange for the property in question. The college offers various forms of secular instruction (including instruction in subjects such as English, speech, foreign languages, music, physical education, history, typing, shorthand, and elementary and advanced accounting). See J.A. 122-125. In its application for the property in question, the college committed itself to making "additions to its offerings in the arts and humanities" (C.A. App. 250) and to increasing safety and other secular benefits for students (*id.* at 255, 257). The government's premise in making the sale to the college was that the college "will be offering many courses tailored to the needs of the community" (*id.* at 196).[2] Thus, there is no merit to the assertion (Americans United Br. 11, 16-17) that the government received nothing from the sale but religious education.

---

[2] Even the "Christian Service assignments," criticized by Americans United (Br. 17), offer significant secular benefits to the community. Those assignments require each student at the college to devote substantial time to activities such as "working with drug addicts" and "alcoholics," "singing for the mentally retarded," "walking mentally retarded children," and "working with physically handicapped children" (J.A. 43).

The significant secular benefits accruing to the government from the sale in question remove the sale from the category of prohibited grants or donations to religious bodies. See *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 746 (1976) ("[i]t long has been established * * * that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task"); *Walz* v. *Tax Commission of New York*, 397 U.S. 664, 672-673 (1970); see also *id.* at 687-689 (Brennan, J., concurring) (noting that religious organizations "contribute to the well-being of the community in a variety of non-religious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community"); *id.* at 696-697 (Harlan, J., concurring); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (upholding the extension of public funds to a church-operated sisterhood that provided hospital services to the community).[3]

2. *a.* Americans United does not make a serious attempt to rebut our demonstration (Br. 17-30) that

---

[3] Americans United also attempts to stress the importance of granting it standing to sue by referring to the fact that the government has made other sales of surplus property to church-affiliated groups. For example, at about the same time that it sold property to Valley Forge Christian College, the government made sales to organizations such as the City of Hope National Medical Center (a provider of health care sponsored by a Jewish organization) and Loyola University (a provider of health care sponsored by a Roman Catholic organization). See C.A. App. 203. For the reasons summarized above, transfers such as these do not suggest a disregard of constitutional requirements. Indeed, Americans United concedes that the validity of such transfers "would depend on the specifics of each case" (Br. 12) and does not claim that the transfers were improper.

it does not have "taxpayer" standing under the specific standards articulated in *Flast* v. *Cohen*, *supra*, and subsequent decisions of this Court. Nor does it come to grips with our demonstration (Br. 30-45) that the "citizen" standing theory endorsed by the court of appeals in this case is inconsistent with *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, and *United States* v. *Richardson*, *supra*. Instead, Americans United advances a sweeping theory of standing to sue that would obliterate the restrictions prescribed in this Court's past opinions. It argues broadly that it may sue, without allegation of concrete personal injury, to vindicate the general "right to be free from religious establishment" (Br. 21). Thus, "every citizen" (*id.* at 25) is a proper plaintiff to challenge actions by the federal government deemed by the citizen to involve an improper benefit to or entanglement with religion. Amicus American Jewish Congress advances the same argument. In the view of amicus, the Establishment Clause "is an important ingredient of the quality of life in our society" (Br. 13), and embodies "a broad prophylactic rule against state sponsorship * * * of religion" (*id.* at 18). From this it follows, according to amicus, that "any citizen might well be able to challenge the gift at issue in this case" (*id.* at 25), since such a gift betokens "favoritism" and impairs the citizen's "rights to be free of such governmental action" (*id.* at 32).

If this reasoning were accepted, the Court's decisions in cases such as *Flast*, *Schlesinger* and *Richardson* would have to be abandoned. Any citizen, however situated, would be entitled to attack any transaction by the federal government with any church-related organization on the theory that the transaction betokened favoritism or impaired the citi-

zen's expectation of living in a society in which the government complies with the First Amendment.[4] Previously recognized prerequisites for standing to sue, such as the requirement that a taxpayer plaintiff allege congressional action under the taxing and spending power (as prescribed in *Flast*), or that a citizen plaintiff allege specific and non-abstract harm to himself (as prescribed in *Schlesinger* and *Richardson*), would be swept aside. As this Court emphasized in *Schlesinger* (418 U.S. at 227), "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."[5]

---

[4] The implications of this theory can scarcely be overstated. For example, this theory of standing to sue would permit a separationist residing in California to sue to compel the federal government to repurchase a five-acre tract of land sold to a church-related college, hospital, or community recreational center in Rhode Island. As in the present case, the plaintiff could argue generally that the consideration for the sale was "constitutionally inadequate." For that matter, a separationist alleging an "incidental expenditure of tax funds in the administration of an essentially regulatory statute" (*Flast* v. *Cohen, supra*, 392 U.S. at 102) could claim that the challenged action deprived him of his "personal constitutional right to a government that does not establish religion" (Pet. App. A28-A29). The same claim could be advanced by a childless citizen complaining of religious exercises in school, even though *Doremus* v. *Board of Education*, 342 U.S. 429, 432-433 (1952), disapproved such claims.

[5] There is nothing in the First Amendment that exempts Establishment Clause litigation from the Article III "case or controversy" requirement. The fact that the Establishment Clause is contained in the Bill of Rights does not result in a displacement of the limitations of Article III. See *Doremus* v. *Board of Education, supra* (applying recognized principles of standing under the Establishment Clause). *Doremus* is cited

b. Americans United also suggests (Br. 22-23), without elaboration, that its members have a "spiritual stake" in the outcome of this litigation that is equivalent to the "aesthetic" or "conservational" interests recognized in other cases. Without reference to the complaint in this case, amicus American Jewish Congress also claims (Br. 13-24) that standing exists because the challenged governmental action, while not coercive, undermines the environment in which members of Americans United live and thus subtly affects their spiritual condition.

The difficulty with this line of argument is that the complaint does not allege, and the depositions and other record materials in no way indicate, how the challenged governmental action in this case could have any adverse effect on Americans United or its members.[6] There is no indication that the challenged

---

with approval both in *Flast* v. *Cohen*, *supra*, 392 U.S. at 102, and *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 225-226. *Flast* itself emphasized that "[a] taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case" (392 U.S. at 101). See also *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963): "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain." Thus, this Court clearly and repeatedly has rejected the notion that the Establishment Clause can be enforced in federal court by any citizen claiming merely that government action beneficial to a religious organization involves "favoritism" or deprives the plaintiff of his right in common with all other citizens to "be free of such governmental action."

[6] Americans United states (Br. 31) that it has certain unidentified members living in Pennsylvania, the State where the land sale took place. See Binns Deposition of Mar. 7, 1978, at 20; Doerr Deposition of Mar. 7, 1978, at 27. However, neither the complaint nor the depositions indicate that any

sale interfered with worship or non-worship, imposed unwelcome ideas or orthodoxies on Americans United, or invaded the personal spiritual domain of its members in any other way. Thus, rather than alleging specific, non-abstract harm, Americans United returns to its general refrain that the Constitution prohibits what the government has done, and asserts that it therefore is entitled to litigate the propriety of the government's action. If accepted, that argument would remove standing as a constitutional prerequisite and would permit any plaintiff to proceed to an adjudication of the merits of his alleged claim.[7]

Pennsylvania member lived in the community involved or was affected in any way by the sale. See Binns Deposition, *supra*, at 20, stating that Binns was "indignant" because the Pennsylvania members "were not aware of the transaction," and that Americans United learned of the transaction only through "a press story." This testimony hardly suggests the existence of concrete personal injury. See *Warth* v. *Seldin*, *supra*, 422 U.S. at 501-502.

[7] Amicus American Jewish Congress suggests (Br. 20-23) that prior lower court decisions support standing to sue in this case. However, none of the cited cases lends substantial support to the standing theories advanced here. In *Aronow* v. *United States*, 432 F.2d 242, 243 (9th Cir. 1970), the district court found that the plaintiff did not have standing to challenge the propriety of inscribing the motto "In God We Trust" on currency. Finding the underlying constitutional claim to be frivolous, the court of appeals affirmed dismissal of the complaint on the merits, concluding that it was unnecessary to consider the issue of standing. Accord, *O'Hair* v. *Blumenthal*, 462 F. Supp. 19 (W.D. Tex. 1978).

Amicus also cites (Br. 22 n.*) a string of state court decisions dealing with religious displays, monuments, and statues erected on public property. In each of the cited state cases, the courts rejected Establishment Clause challenges to such religious displays. In none of the cited cases did the state

c. It is true, of course, that this Court has recognized that persons complaining of direct personal injury, distinct from economic injury, have standing to sue in appropriate cases. Thus, in *United States* v. *Students Challenging Regulatory Agency Procedures*

---

court consider standing to sue. Moreover, as emphasized in *Doremus* v. *Board of Education, supra*, 342 U.S. at 434, state courts, unlike federal district courts, are not constrained by Article III of the Constitution and may issue "advisory" opinions beyond the jurisdiction of federal courts.

Whatever the vitality of *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29, 30-31 (10th Cir. 1973), following this Court's decisions in *Richardson* and *Schlesinger*, that case has no bearing on the issues presented in this case. In *Anderson*, the court of appeals rejected on the merits an Establishment Clause challenge to the erection of a religious display on public property. Standing to sue was found to be present because the plaintiffs were local users of the property in question and were subject to unwanted proselytism caused by the display. There is no similar allegation in the present case. In contrast to *Anderson*, Americans United does not claim that, in its capacity as a local resident and user of public property, it has become a captive audience for unwelcome religious messages.

The district court's decision in *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce*, 510 F. Supp. 886, 890 (N.D. Ga. 1981), does agree with the standing theory of Americans United, but that decision is plainly inconsistent with prior rulings of this Court. There, the district court held that "the individual plaintiffs in the instant case gave testimony on their *concerns* with the separation of church and state, and this is sufficient to demonstrate standing to sue." *Ibid.*; emphasis added. For that proposition, the district court cited the Third Circuit's decision in the case now before this Court. The district court's unbounded definition of standing to sue cannot be reconciled with this Court's ruling that, in Establishment Clause cases, "[i]t is not a question of motivation[,] but of possession of the requisite * * * interest that is, or is threatened to be, injured by the unconstitutional conduct." *Doremus* v. *Board of Education, supra*, 342 U.S. at 435.

(*SCRAP*), 412 U.S. 669 (1973), the Court concluded that users of public recreational land in the District of Columbia had standing to complain of illegal governmental action impairing their ability to use and enjoy the public land. This ruling rested on an allegation of specific personal injury—"[the plaintiffs] point specifically to the allegations that their members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by [the challenged governmental action]" (*id.* at 685). The plaintiffs in *SCRAP* claimed that the challenged action of the government "would directly harm them in their use of the natural resources" (*id.* at 687), and they alleged "a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected" (*id.* at 689). Those allegations clearly separated the plaintiffs in *SCRAP* from concerned citizens "with a mere interest in the problem" (*id.* at 689 n.14).

In the present case, by contrast, the complaining parties have not alleged that the challenged governmental action actually impinges upon their lives. And their abstract claim, as set forth in their complaint, depositions, and briefs, cannot be distinguished from that which could be asserted by any other citizen who favors constitutional government. See *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 223 (footnote omitted):

> It is one thing for a court to hear an individual's complaint * * * that individual enjoyment of certain natural resources has been impaired by [government] action (*United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)), but it is another

> matter to allow a citizen to call on the courts to resolve abstract questions. The former provides the setting for a focused consideration of a concrete injury. In the latter, although allegations assert an arguable conflict with some limitation of the Constitution, it can be only a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant.

In other words, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972).[8]

d. Both Americans United (Br. 26-27) and amicus National Coalition for Public Education and Religious Liberty (Br. 10-13) argue that it is anomalous to deny the members of Americans United standing as taxpayers to challenge transfers of real estate when taxpayers may bring suit to challenge expenditures of money. The economic effect, they contend, of both kinds of governmental action is similar be-

---

[8] *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), cited by Americans United (Br. 21-22), holds only that a class representative in a class action may seek appellate review of an erroneous denial of class certification following expiration of his substantive claim. The Court emphasized, however, that "[a] named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified" (445 U.S. at 404). The procedural "right" of a class representative to obtain certification of a class (*id.* at 403), which in turn has a direct stake in the outcome of the litigation, differs fundamentally from the mere abstract "interest" that Americans United has in the outcome of this litigation. See *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739.

cause both property conveyances and disbursements of money have the potential to deplete the "assets" of the government. This rough equivalence argument, however, cannot be squared with *Flast*. *Flast* held in unequivocal terms that "a taxpayer will be a proper party to allege the unconstitutionality *only* of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." 392 U.S. at 102 (emphasis supplied). As demonstrated in our opening brief (at 26-28), Americans United challenges action by Executive Department officials, not the enactment of any law by Congress, and the challenged action was taken pursuant to Article IV, Section 3—not Article I, Section 8—of the Constitution. This is fatal to an attempted taxpayer suit. See *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 228; see also *id.* at 229 (Stewart, J., concurring); *United States* v. *Richardson*, *supra*, 418 U.S. at 174-175.[9]

Nor is there economic merit to the rough equivalence argument. A taxpayer action seeking to enjoin appropriations and expenditures by Congress under the taxing and spending power puts a halt to financial disbursements and, *pro tanto*, preserves the wealth of the government. "The impact on federal taxpayers in such cases is conceptually direct, even

---

[9] Without explanation, Americans United refers to its purported taxpayer grievance as an inhibition of "freedom of conscience." Thus, the challenged government action assertedly forced members of Americans United "to give support to someone else's religion" (Br. 24). However, the interest of an individual taxpayer in the aggregate funds or assets of the government is "indeterminable" and "remote" (*Doremus* v. *Board of Education*, *supra*, 342 U.S. at 433-434). Accordingly, taxpayer standing to challenge an expenditure on Establishment Clause grounds exists only if the standards of *Flast* are satisfied.

though the dollar-and-cents consequence for a taxpayer is minimal." *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211, 218 (D.C. Cir. 1976). By contrast, an action seeking to compel the government to resume ownership of surplus property, to make arrangements for another disposition of that property, and to maintain the property in the interim, is most likely to deplete rather than to preserve the wealth of the government.[10] Thus, there is no "logical nexus" between taxpayer status and Americans United's claim that the government improperly has disposed of surplus property. *United States* v. *Richardson*, *supra*, 418 U.S. at 175.

3. Americans United also contends (Br. 11-12, 18-19, 29-30) that denial of standing in this case would "remove from judicial scrutiny a substantial portion of constitutional abuses" and would be a prescription for lax enforcement of the Establishment Clause. That result, it is asserted, would be inconsistent with the importance and dignity of the Establishment Clause in our constitutional scheme. We quite agree that the Establishment Clause is an important constitutional provision and should vigorously be enforced. But it can be enforced in federal court only as permitted by Article III of the Constitution.

---

[10] Current high interest rates and shortages of funds in non-profit institutions underscore this economic proposition. If the federal government were compelled to resume ownership of the 77-acre tract of land here in question, and were compelled to attempt to locate a new buyer of the property—property encumbered with surplus military buildings that would require demolition or substantial renovation—there is no assurance that a prompt resale could be arranged. The substantial cost to the government of maintaining the property, and of exploring the prospects for a resale, could easily exceed the sale price ultimately obtained for the surplus property. (See our opening brief at 22 n.11.)

Moreover, application of traditional standing requirements to Establishment Clause cases is not a prescription for lax enforcement. In any case in which the plaintiff challenges disbursements under a law passed by Congress pursuant to the Taxing and Spending Clause, standing exists within the rules prescribed in *Flast* v. *Cohen*, *supra*. Similarly, in any case in which government action causes economic injury to the plaintiff or exposes him to legal sanctions, this Court's decisions recognize standing to sue. See *McGowan* v. *Maryland*, 366 U.S. 420, 430-431 (1961); *Two Guys from Harrison-Allentown* v. *McGinley*, 366 U.S. 582, 585-586, 592 (1961); *Board of Education* v. *Allen*, 392 U.S. 236, 241 n.5 (1968). Finally, in cases in which the plaintiff alleges with specificity that governmental action in violation of the Establishment Clause imposes unwanted religious ideas, or invades the domain of personal spiritual liberty, standing to sue is recognized without proof of actual coercion. See *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963).[11]

Standing does not exist, however, when the complaining party alleges no direct and identifiable injury to himself as a consequence of the asserted unconstitutional action of the government. General claims that the government has failed to abide by the Constitution or has deprived the plaintiff of his right in common with all other citizens to live under a government that adheres to constitutional standards do not satisfy the Article III standing requirement.

---

[11] See also *Stone* v. *Graham*, 449 U.S. 39 (1980), involving the practice of posting religious materials in school classrooms. The plaintiffs in *Stone* included impressionable students, who were subjected to these unwelcome religious messages from the government, as well as their parents. See *Stone* v. *Graham*, 599 S.W.2d 157, 159 (Ky. 1980).

Doremus v. *Board of Education*, *supra*, 342 U.S. at 434-435, quoted in *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 225-226.

Thus, our submission in this case recognizes that judicial remedies are available for persons alleging Establishment Clause violations in all categories of cases in which judicial remedies traditionally have been afforded. When an individual citizen alleges concrete personal harm that can be rectified by a specific judicial decree, federal courts properly may undertake the weighty responsibility of adjudicating the constitutional propriety of the conduct of a coequal branch of government. But in the absence of such allegations, the remedy lies with the Legislative and Executive branches. See *United States* v. *Richardson*, *supra*, 418 U.S. at 179 ("[i]n a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process"). Disregard of this limitation would only serve to "create the potential for abuse of the judicial process, distort the role of the judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 222.[12]

---

[12] As explained in our opening brief (at 43 n.26), strict adherence to these limitations is particularly important in challenges based on the Establishment Clause, because "virtually every contact between the government and a religious institution potentially raises an Establishment Clause violation." For example, Americans United asserts (Br. 13) that the violation in this case arose not from "the Government's decision to declare the property surplus and to sell it" to

4. Finally, Americans United claims (Br. 31-32) that standing should be recognized in this case because it has a "national role in church-state litigation," has certain members who find the governmental action in question in this case to be "especially repugnant," and has "the knowledge and resources to present sincerely and responsibly to the courts a vigorously argued case." However, the decisions of this Court repeatedly have held that "mere 'interest in a problem', no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem," is not sufficient to confer standing to sue. *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739. "Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement * * *." *Ashcroft* v. *Mattis*, 431 U.S. 171, 173 (1977). In other words, "[i]t is not a question of motivation," but possession of the requisite personal

---

Valley Forge Christian College, but from the alleged inadequacy of the compensation paid by the college. Hence, courts would be required to engage in difficult and necessarily subjective valuation proceedings, at the behest of any citizen, to resolve the numerous First Amendment challenges that would surely follow from the abrogation of the standing doctrine in this class of cases.

Of course, our submission that, in the absence of an actual case of controversy, Establishment Clause grievances should be presented to the Legislative and Executive branches does not disparage the high rank that the Establishment Clause occupies in our constitutional system (compare Americans United Br. 24). When individual interests are impinged upon by governmental action in violation of the Establishment Clause, we agree with Americans United that the judiciary should be quick to entertain complaints (*id.* at 28-30). When Article III minima are not present, however, the Establishment Clause must vigorously be enforced by the political branches, which also are obligated to uphold the Constitution.

stake in the controversy that is dispositive in analyzing standing to sue. *Doremus* v. *Board of Education*, *supra*, 342 U.S. at 435. Moreover, as this Court emphasized in *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, 418 U.S. at 227: "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." [13]

Nor is Americans United aided in claiming standing to sue by reference (see Br. 25-27) to the Administrative Procedure Act, 5 U.S.C. 702.[14] Parties seeking to invoke the judicial process under the Administrative Procedure Act must satisfy the Article III case or controversy requirement. See *Sierra Club* v. *Morton*, *supra*, 405 U.S. 734-741; *United States* v. *SCRAP*, *supra*, 412 U.S. at 686-689; see generally *Califano* v. *Sanders*, 430 U.S. 99, 104-107 (1977).[15] The case or controversy requirement, recognized under both Article III of the Constitution and the Administrative Procedure Act, "prevents the judicial process from becoming no more than a vehicle for the

---

[13] Beyond this, other potential plaintiffs, with better claims to standing to sue, may well be available to test the substantive legal issues that Americans United seeks to litigate. (See our opening brief at 41-42 n.24.)

[14] Americans United did not argue in the court of appeals or the district court that the Administrative Procedure Act alters the rules of standing applicable to this litigation, and the courts below did not pass on any such contention. That argument, therefore, is not properly presented in this Court. *United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

[15] Moreover, prudential limits on standing to sue are also applicable under the Administrative Procedure Act. See *Control Data Corp.* v. *Baldrige*, Nos. 80-1143, *et al.* (D.C. Cir. Mar. 25, 1981), slip op. 12-30 (collecting cases), petition for cert. pending, No. 80-2175 (filed June 23, 1981).

vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, *supra*, 412 U.S. at 687. Americans United falls into the category of a "concerned bystander" because it has failed to allege specific concrete injury to itself that could be remedied through a judicial decree in its favor.

In any event, the Administrative Procedure Act grants standing only to persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute* * * *" (5 U.S.C. 702) (emphasis added). The Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.*, was not intended to grant enforceable rights to persons complaining of a disposition of public property (cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-128 (1940)), and, indeed, Americans United's amended complaint does not even allege a violation of the statute (J.A. 11).

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN M. SHAPIRO
Deputy Solicitor General

SEPTEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 354930 623